No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1943

FRANK ROBERTS, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The majority (R. 10–12) and dissenting (R. 12–14) opinions in the circuit court of appeals are reported at 131 F. (2d) 392.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 24, 1942 (R. 14); and a petition for rehearing denied January 16, 1943 (R. 15). The petition for a writ of certiorari was filed February 20, 1943, and was granted April 5, 1943 (R. 17). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Petitioner was given a general sentence of a fine of $250 and imprisonment for two years. He was placed on probation as to the prison sentence provided he pay the fine. He paid the fine but later violated the terms of his probation; probation was revoked, and he was sentenced to imprisonment for three years. The question presented is whether the Probation Act authorizes this "increase" in sentence and, if so, whether, in violation of the Fifth Amendment, double punishment results.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb * * *.[1]

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259, *et seq.*, as amended by the Act of

[1] While couched in terms of jeopardy, this Court said in *Ex parte Lange*, 18 Wall. 163, 173, that it did not doubt that this language "was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." See also *Albrecht* v. *United States*, 273 U. S. 1, 11; *United States* v. *Benz*, 282 U. S. 304, 307.

June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725) are:

SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia,[2] when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required

[2] The District of Columbia had its own probation statute (see D. C. Code, Title 24, Secs. 101–105).

to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

STATEMENT

Petitioner pleaded guilty in the District Court for the Northern District of Alabama on April 25, 1938, to a two-count indictment charging him and two others with violating the Act of February 13,

1913, as amended (18 U. S. C. 409), by stealing cases of cigarettes and tobacco from an interstate shipment of freight and receiving and having the stolen cigarettes in their possession, knowing them to have been stolen (R. 1–3). On April 26, 1938, the court sentenced petitioner generally to serve 2 years' imprisonment and to pay a fine of $250, petitioner to stand committed on May 25, 1938; but the judgment provided that "said prison sentence imposed be suspended and defendant placed on probation for a period of Five (5) Years, conditioned upon defendant paying the fine imposed" (R. 3–4). While the record does not show the precise date the fine was paid, it was unquestionably paid before the commitment date, since it is clear that execution of the prison sentence was suspended and petitioner placed on probation (R. 4–5).[3]

[3] There is no factual statement in petitioner's brief on the merits, but at one place in his argument (Br. 14) and also in the petition for a writ of certiorari (Pet. 18) he states that "The fine was paid and on May 26, 1938 (the day following commitment), the 'prison sentence' was suspended," and that "The defendant was 'committed' on May 25, 1938, and on the following day the prison part of the sentence was suspended." If petitioner means that there was a formal order on May 26, 1938, the day following the "commitment" date, suspending the prison sentence and placing him on probation, there is nothing in the record which substantiates that. In any event the record contains nothing which shows, and petitioner does not assert, that he was ever actually "committed" before the suspension of execution of the prison term and probation became effective, *i. e.*, that he was ever delivered to

On June 19, 1942, within the probation term, petitioner was brought before the court and charged with violating the terms of his probation. Finding that he had in fact violated his probation, the court entered a judgment revoking petitioner's probation, setting aside the "sentence heretofore suspended" and sentencing petitioner to imprisonment for a period of three years, one year more than the term originally imposed (R. 4–5). The judgment was affirmed on appeal, one judge dissenting (R. 10–14).

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a jail or penitentiary for service of the prison sentence—the time when, under 18 U. S. C. 709a, he would start service of his prison sentence. There is no claim that the probation and suspension of prison sentence were ineffective, as they would have been, if petitioner had previously commenced to serve his prison sentence. *United States* v. *Murray*, 275 U. S. 347. The record makes it clear, we think, that the suspension of execution of the prison sentence and probation followed immediately upon payment of the fine, without any interval of service of the prison sentence (R. 4–5). Indeed, at one place in his petition for a writ of certiorari (p. 4) petitioner states categorically "that the fine of $250.00 was paid *immediately* upon imposition of the [original] sentence, and that the execution of the remainder of the sentence was suspended, and the petitioner was placed on probation by the Court for a period of five years." [Italics supplied.] And at other places in his petition he states that probation and suspension of the execution of the prison term followed immediately upon the payment of the fine (Pet. 2). Moreover, his argument implicitly recognizes the validity of the probation and the suspension of the prison sentence, his contention being that payment of the fine prevented the increasing, upon revocation of probation, of the prison term (Br. 3, 4, 9, 12, 14, 15).

SUMMARY OF ARGUMENT

I

Under the Probation Act the district court was empowered to impose a fine and suspend the execution of a prison sentence. Section 1 of the Act so provides in plain terms, and the provision accords with the philosophy of the Act in avoiding the stigma of imprisonment and the contaminating influence of association with hardened criminals while at the same time permitting the exaction of a different kind of punishment, pecuniary in character. The pattern for this type of "split sentence" was found in state legislation existing when the federal act was adopted.

Section 2 of the Act authorizes the court to revoke the probation or suspension of sentence and impose any sentence which might originally have been imposed. This power does not apply, of course, to the portion of the sentence which has been executed, that is, the fine. But it does permit revocation either where sentence of imprisonment has not been imposed or where its execution has been suspended. In the latter case, upon revocation, the original sentence may be retained, or it may be diminished or increased, within the limits of any sentence of imprisonment which might have been imposed. That Congress did not intend to make a sharp differentiation between suspension of imposition and suspension of execution in this regard is indicated not only

by the language employed, but by the consequences which would arise upon such a distinction. Courts would inevitably turn to the device of suspending imposition of sentence rather than execution; and it cannot be supposed that Congress intended to impel this result in a statute whose keynote is flexibility in administration. See *Burns* v. *United States*, 287 U. S. 216, 220. Moreover, the present Act is in contrast to an earlier measure which was passed but pocket-vetoed, which provided that upon revocation of suspension of sentence the defendant must serve the sentence originally imposed. Congress took as its model the New York statute, which provided for the imposition of any punishment which might originally have been imposed.

It follows that, whether imposition or execution is suspended, the declaration of the court with respect to the suspended punishment is tentative until revocation occurs or the period therefor has passed.

II

Since the declaration of punishment was tentative or provisional, there is no double jeopardy in changing the declared term of punishment from two years to three years upon proceedings for revocation. The difference to the defendant between suspension of imposition and of execution is one of "trifling degree," as this Court observed in the *Korematsu* case, decided at the last Term.

It would be unrealistic to cause constitutional rights to pivot on such a distinction. Indeed, if the action of the court in the present case were unconstitutional, doubt would be cast on the power to extend the period of probation itself, a power which is also expressly granted in the Act and which is at the core of the probationary scheme; probation itself is a form of "ambulatory punishment," as this Court said in the *Korematsu* case.

The only decisions on the question under the Probation Act support our position. See, in addition to the present case, *Moore* v. *United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664, in which the trial judge was Mr. Justice Van Devanter; and *Remer* v. *Regan*, 104 F. (2d) 704 (C. C. A. 9), certiorari denied, 308 U. S. 553. The cases relied on by petitioner involved the partial execution of sentences which were completely final in character.

ARGUMENT

Petitioner contends that the district court had no authority to "increase" his prison sentence from two to three years upon revocation of his probation, arguing that his payment of the $250 fine was a partial execution of his sentence and that the Fifth Amendment prohibits an increase in sentence after partial execution thereof (Br. 3, 4, 9, 12, 14, 15). The dissenting judge in the circuit court of appeals appears also to take that position as well as the broader one that the Fifth

Amendment forbids any increase in sentence upon revocation of probation, irrespective of the payment of a fine (R. 13). Hence, both arguments conclude that the Probation Act must be construed as not authorizing the "increase" in sentence which here resulted when probation was revoked (Br. 9; R. 13), although they apparently acknowledge that the Act is susceptible of that interpretation (Br. 8–9, R. 13).

These arguments rest upon concepts of finality of a criminal sentence as a measure of punishment which are without value where the sentence is accompanied by probation pursuant to the grant of authority contained in the Probation Act. Where a sentence is completely suspended in operation and the defendant placed on probation, it is our position that the Act permits a nullification of that sentence on revocation of probation, and the imposition of any sentence, within the permitted maximum, which might originally have been given. The Act also authorizes what may be termed a "split" sentence, like the one here imposed. Where fine and imprisonment is imposed, payment of the fine may be compelled at the same time that execution of the imprisonment portion of the sentence is suspended. The prison portion of the sentence, in contrast to the fine, is not final as a measure of punishment, and on revocation of probation the court may vacate it and impose any term of imprisonment which it might originally

have imposed, whether more or less than that first given. The Act, so construed, is not, we submit, subject to the infirmity that it permits double punishment.

I

THE ACT AUTHORIZED THE "INCREASE" IN THE PRISON SENTENCE UPON REVOCATION OF PROBATION

Background of the statute.—The Federal Probation Act was passed in 1925. Prior thereto this Court had held in *Ex parte United States*, 242 U. S. 27, decided in 1916, that a Federal court was without inherent power either to refrain from the imposition of sentence, or to suspend the execution of a sentence, during the good behavior of the defendant. It was also settled, as a general principle, that a Federal court could not set aside or alter its judgments, either in criminal or civil cases, after the expiration of the term at which they were entered, unless a proceeding for that purpose was begun during the term. *United States* v. *Mayer*, 235 U. S. 55, 67, decided in 1914. It had further been held that a court even during the term could not increase a valid sentence, or a valid portion thereof, which had already been satisfied. *Ex parte Lange*, 18 Wall. 163. The theory appears to have been that the beginning of the service of a sentence, and hence a partial execution of it, ended the power to change it, at least to the extent of increasing it, although the change was attempted at the same term. *United States* v.

Murray, 275 U. S. 347, 358; *United States* v. *Benz*, 282 U. S. 304, 307–309;[4] cf. cases cited in footnote 32, *infra*, p. 34.

It is therefore evident that prior to the enactment of the Probation Act a Federal court was rigidly bound to impose sentence in a criminal case upon conviction; it was not able to retain any control over its sentence during the good conduct of the defendant; and it could not, even at the same term, if there had been a partial execution or satisfaction, increase a valid sentence, however justifiable might be the ground therefor.

These principles were just as applicable where the sentence was a fine, or fine and imprisonment, as where it was one of imprisonment alone. Cf. *Ex parte Lange, supra; In re Bradley*, 318 U. S. 50. Fines and imprisonment were considered co-equal, legally, as media of punishment, even though their impact was not the same. (See, *e. g.*, *United States* v. *Mitchell*, 163 Fed. 1014, 1016 (C. C. D. Ore.).) Nothing was to be served by differentiation between them in the situations in which the principles recited were applied.

But since a fine is primarily a pecuniary punishment, while imprisonment requires detention

[4] In the latter case, decided after the passage of the Probation Act, it was held that at the same term a court could shorten a term of imprisonment, although the defendant had entered upon the service of his sentence.

of the offender either in a jail or a penitentiary, there was good reason for making a differentiation for purpose of probation. It is our position that the Probation Act did properly, permit a severance of the ancient tie between fines and imprisonment, and that it is this severance which furnishes the key to the resolution of the problem presented by petitioner.

In *Ex parte United States, supra,* at p. 52, this Court had suggested that Congress had "adequately complete" power to permit the suspension of the imposition or execution of sentence and the granting of probation. This suggestion furnished the inspiration for a movement to enact a Federal probation act (*United States* v. *Murray,* 275 U. S. 347, 354–355, 357; H. Rep. No. 1377, 68th Cong., 2d Sess., pp. 1, 3), but it was not until eight years later that the present legislation resulted, accomplishing, as was said in *United States* v. *Maisel,* 26 F. (2d) 275, 276 (S. D. Tex.), "at one stroke for the federal courts the redramatization of the criminal law" by making the punishment fit the individual.

The dominant purpose of the statute was well summarized by Chief Justice Taft in the *Murray* case, *supra,* at pp. 357–358, when he said:

> What was lacking in these provisions [for executive clemency and parole] was an amelioration of the sentence by delaying actual execution or providing a sus-

pension so that the stigma might be withheld and an opportunity for reform and repentance be granted before actual imprisonment should stain the life of the convict. This amelioration had been largely furnished by a power which trial courts, many of them, had exercised to suspend sentences. In some sections of the country it had been practiced for three-quarters of a century. By the decision in *Ex parte United States*, 242 U. S. 27, that remedy was denied. In that case, however, this court suggested legislation to permit probation. For eight years thereafter Congress was petitioned to enact it, and finally the Probation Act was passed.

The great desideratum was the giving to young and new violators of law a chance to reform and to escape the contaminating influence of association with hardened or veteran criminals in the beginning of the imprisonment. Experience had shown that there was a real *locus poenitentiae* between the conviction and certainty of punishment, on the one hand, and the actual imprisonment and public disgrace of incarceration and evil association, on the other. If the case was a proper one, great good could be done in stopping punishment by putting the new criminal on probation. The avoidance of imprisonment at time of sentence was therefore the period to which the advocates of a Probation Act always directed their urgency. * * *

It was therefore held in that case that when a person sentenced to imprisonment has begun to serve his sentence the court is without power under the Act to grant him probation, even though

the term at which the sentence was imposed had not expired.[5]

But the avoidance of imprisonment and its accompanying consequences does not require that, in the grant of probation, the defendant should go free of a different kind of punishment or that he should escape all burdens except the necessary one of behaving himself properly. It is entirely consistent with that aim that, at the same time provision is made to free him of imprisonment, he be required to pay a fine,[6] or to provide for his dependents or to make good the damages his offense caused. There was no occasion therefore for Congress, in the enactment of a probation law, to require that fines be treated on the same footing as imprisonment; and it is because

[5] It has since been held that a court may grant probation on one indictment or count and may sentence to imprisonment on another indictment or count. *Frad* v. *Kelly*, 302 U. S. 312; *Cosman* v. *United States*, 303 U. S. 617; see also *Burns* v. *United States*, 287 U. S. 216. While the language utilized in Section 1 of the Act permitted no escape from this conclusion, since it authorizes exercise or nonexercise of the probationary power as to "any crime or offense," this, of course, does not detract from the fact that the dominant aim of the statute, in authorizing the grant of probation, is the avoidance of imprisonment.

[6] In *Barney* v. *Aderhold* (N. D. Ga.), unreported, but quoted in Chappell's *Decisions Interpreting the Federal Probation Act* (1937), pp. 13–14, it was said: "It is believed that imprisonment stands on a different footing from a fine. A fine is a punishment 'tis true, but it is not a punishment inconsistent with the main purpose of probation, namely—rehabilitation."

Congress did not do so, as we shall show, that the ordinary rules as to when a sentence becomes final and unchangeable as the yardstick of punishment are inapplicable.

Exaction of a fine and suspension of execution of a prison sentence under Section 1.—Section 1 provides that for any offense not punishable by death or life imprisonment the district courts shall have power—

> to suspend the imposition or execution of sentence and to place the defendant upon probation for such period [7] and upon such terms and conditions as they may deem best; *or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid.* * * *
>
> *While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being* placed on probation. * * * [Italics supplied.]

The salient feature of these provisions is the flexibility which they permit in imposing sanctions. As was said by Mr. Chief Justice Hughes in *Burns* v. *United States*, 287 U. S. 216, 220, "To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. * * * The provisions of the Act are adapted to this end." Section 1, *supra*, em-

[7] It is provided, however, in Section 1 that "The period of probation, together with any extension thereof, shall not exceed five years."

powers a court either (a) to suspend sentence entirely, by suspending imposition or execution, or (b) to pronounce a "split sentence,"[8] by requiring the payment of a fine (where permitted by the substantive law) as a condition to the granting of probation, as in the present case,[9] or as one of the terms of probation,[10] while at the same time deferring the imposition or execution of a term of imprisonment.[11] Our concern is primarily with the authority to impose a fine as part of a sentence, which in its remaining part is suspended.

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[8] *Cote* v. *Cummings*, 126 Me. 330, 335 (1927).

[9] *Reeves* v. *United States*, 35 F. (2d) 323, 324, 326 (C. C. A. 8); *Campbell* v. *Aderhold*, 36 F. (2d) 366, 367 (N. D. Ga.); cf. *Hollandsworth* v. *United States*, 34 F. (2d) 423, 426 (C. C. A. 4); *In re McVeity*, 98 Cal. App. 723, 726, 727 (1929).

[10] H. Rep. No. 1377, 68th Cong., 2d Sess., p. 5; *Archer* v. *Snook*, 10 F. (2d) 567, 569 (N. D. Ga.); *Scalia* v. *United States*, 62 F. (2d) 220, 221 (C. C. A. 1).

[11] This alternative would seem to exclude the converse, that a court may suspend payment or satisfaction of a fine and at the same time require that the offender serve a term of imprisonment. *Archer* v. *Snook*, 10 F. (2d) 567, 569 (N. D. Ga.). Such a sentence would fly in the teeth of the purpose of the probation act to avoid imprisonment. *United States* v. *Murray*, *supra*. As was said in *Barney* v. *Aderhold*, *supra*, "It may * * * be noted that the Act itself specifically provides for fine in connection with probation, but is conspicuously silent as to imprisonment and probation."

There can only be a complete suspension of whatever sentence is pronounced (cf. *Santis* v. *Esola*, 50 F. (2d) 516 (C. C. A. 9) or, alternatively, a partial execution and a partial suspension, in the single instance where the payment of a fine is required concomitantly with suspension of the imposition or execution of a prison sentence.

This authority is in furtherance of the basic philosophy of the Act, as enunciated by this Court in the *Murray* case, of avoiding the stigma of imprisonment and the contaminating influence of association with hardened and veteran criminals (*supra*, pp. 14–15), while permitting the imposition of a different kind of punishment, a pecuniary punishment.[12] The pattern for this form of "split sentence" was evidently found principally in the New York and Massachusetts statutes.[13]

[12] There can be no doubt that since Congress can validly permit a court, in the interest of probation, completely to suspend the imposition or execution of sentence (*Ex parte United States*, *supra*), it can exercise the lesser power of allowing a partial suspension and a partial execution for the same reason. In *Frad* v. *Kelly*, 302 U. S. 312, 315–316, this Court, after reciting the provisions of Sections 1 and 2, including the provision in Section 1 authorizing the courts to impose a fine and place the defendant upon probation, stated that "The validity of the cited provisions is not open to question."

[13] In the House Report on the bill which became the probation law it was stated that "This bill is modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work," and that "two States, New York and Massachusetts, may be cited as having the most complete systems." (House Report No. 1377, *supra*, pp. 3, 4.)

At the time of the enactment of the Federal Probation Act elaborate provision was made in Massachusetts permitting a specialized treatment of fines. (See Mass. Ann. Laws (1932; 1942 Supp.), ch. 279, secs. 1 and 1A, which, with minor amendments, state the law as it was at the time the Federal statute was passed.)

Section 2188 of the New York Penal Code provided that the courts could "suspend sentence or impose sentence and suspend the execution of the whole or *a part of* the judgment

Revocation and imposition of greater prison sentence under Section 2.—The Government does not contend, as petitioner seems to assume (Br. 8–9), that where, as here, a fine has been exacted and paid as a condition to relief from the service of a term of imprisonment and the grant-

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and may in either case place the defendant on probation." Corresponding provisions were contained in Sections 470–a and 483 (1) of the New York Code of Criminal Procedure. [Section 2188 of the Penal Code and Sections 470–a and 483 (1) of the Code of Criminal Procedure were amended in 1925 after the Federal act was passed by deleting the words "whole or part of," thereby withdrawing the previous authority to suspend sentences in part (See N. Y. Laws, 1925, ch. 276, passed April 1, 1925, and effective September 1, 1925; *Ex parte Kuney*, 5 N. Y. S. (2d) 644, 662 (1938)).] Identical provisions are contained in the probation laws of at least four states (See, *e. g.*, Ala. Code (1940) Title 62, sec. 130; Maine Laws (1933), ch. 233; Mass. Ann. Laws (1932; 1942 Supp.), ch. 279, sec. 1A; Miss. Code Ann. (1930), ch. 21, sec. 1298.

In Indiana it is provided that "in case the court shall impose a fine, with a concurrent sentence of imprisonment, the court may suspend the execution of the sentence of imprisonment and may place the defendant on probation and may require that said fine be paid in one or several sums while on probation" (4 Ind. Stats. Ann. (Burns 1933), sec. 9–2209).

At least three states have provisions identical with the Federal act in so far as they give their courts power to "impose a fine" and also place the defendant upon probation and provide that payment of the fine may be a condition of probation (see N. C. Code Ann. (1939), sec. 4665 (1) and (3); 4 Colo. Stats. Ann. (1935), c. 140, secs. 1 and 2; S. C. Code (1942), sec. 1038–1 and 1038–3). One of these, the North Carolina statute (*State* v. *Wilson*, 216 N. C. 130, 133–134 (1939); *State* v. *Pelley*, 221 N. C. 487, 498 (1942), has been interpreted as authorizing the imposition of a "split" sentence. The California and Virginia statutes, which in this

ing of probation, the court has the power upon revocation of probation to impose an additional fine. The fine portion of the judgment has been satisfied and executed. Cf. *Santis* v. *Esola*, 50 F. (2d) 516, 517 (C. C. A. 9). The only portion of the judgment over which the court retains control beyond the term is that part covered by the suspension and as to which the offender is on probation, the part dealing with imprisonment.

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connection merely provide that fine may be a condition to probation (Cal. Penal Code (Deering 1937), sec. 1203.1; Va. Code Ann. (1936; 1940 Supp.), sec. 1922b), have been interpreted as impliedly authorizing a "split" sentence (see *Ellis* v. *Dept. of Motor Vehicles*, 51 Cal. App. (2d) 753 (1942); *Richardson* v. *Commonwealth*, 131 Va. 802 (1921)). Others of these state statutes simply provide that the payment of a fine may be a condition of probation (see *e. g.*, 25 Mich. Stats. Ann. (1935), sec. 28.1133; Oregon Comp. Laws Ann. (1940), sec. 26-1226; Utah Code Ann. (1943), sec. 105-36-17; 10 Rev. Stats. of Wash. (Remington 1931), sec. 10249-5b; N. J. Stats. Ann. (1939), sec. 2.190-2; W. Va. Code (1941 Supp.), sec. 6291 (16)), but would seem interpretable as authorizing the imposition of "split" sentences, for all of these probation acts, however worded, reflect the general intent to suspend service of a "prison" sentence while at the same time authorizing the imposition of some punishment, by the way of a fine, for the offense committed.

California and Michigan go so far as specifically to authorize service of a jail sentence as a condition of probation. This, it would seem is a misapplication of the basic theory which underlies probation legislation.

For a composite review of the probation statutes of the several states as of 1939, see *Attorney General's Survey of Release Procedures*, Vol. I, *Digest of Federal and State Laws on Release Procedures*.

Pursuant to that control, and in order to make the statute effective, a defendant who violates the terms and conditions of his probation may, under the authority of Section 2,[14] be brought before the court and given a hearing (*Escoe v. Zerbst*, 295 U. S. 490, 492). If the charge is found to have been sustained, "Thereupon the court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed." In the instant case the court ordered "that the probation of the said defendant be * * * revoked and sentence heretofore suspended * * * set aside" and imposed a new term of imprisonment for three years (R. 5), which was within the permitted maximum (18 U. S. C. 409).

The use of the word "or," rather than "and," in the clause giving the court permission "to revoke the probation or the suspension of sentence"

[14] The portion of Section 2 here involved reads as follows:

"At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. *Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.*" [Italics supplied.]

does not narrow the power of revocation. Probably the alternatives were employed to take account of the situation where revocation occurs, as it may, after the period of probation but during the maximum period for which the defendant might have been sentenced.[15] In that situation, revocation of "probation" would be futile; revocation of "suspension of sentence," however, would be effective, whether the suspension had related to imposition or execution, and the phrase is aptly used to include both sorts of suspension.[16]

[15] See *Frad* v. *Kelly*, 302 U. S. 312, 318; *Moore* v. *United States*, 101 F. (2d) 56, 58 (C. C. A. 2), certiorari denied, 306 U. S. 664; *Van Riper* v. *United States*, 113 F. (2d) 929 (C. C. A. 2), certiorari denied, 311 U. S. 696; *Mason* v. *Zerbst*, 74 F. (2d) 920 (C. C. A. 10); *Hollandsworth* v. *United States*, 34 F. (2d) 423, 427 (C. C. A. 4); cf. *Sanford* v. *King*, 136 F. (2d) 106, 108–109 (C. C. A. 1).

For present purposes it is unnecessary to consider whether conduct giving occasion for revocation, or only the revocation itself, may occur after the period of probation. Cf. *Moore* v. *United States*, *supra*.

[16] Another explanation of the language is given in *Scalia* v. *United States*, 62 F. (2d) 220, 223, where the Circuit Court of Appeals for the First Circuit said:

"The phrase 'suspension of sentence' in this paragraph, as ordinarily used and understood, means the suspension of the execution of a sentence already imposed; and the phrase 'revoke the probation' undoubtedly refers to the situation where, under the provisions of the act, imposition of sentence has been withheld but probation granted; * * *. In other words the phrase 'thereupon the court may revoke the probation or the suspension of sentence' means that the court may revoke the probation and suspension of sentence where

No court has ever denied nor do the petitioner and the dissenting judge question, that the power to revoke under Section 2 is coterminous with the power to suspend sentence and place on probation granted in Section 1. The revocation clause has uniformly been construed as authorizing revocation in a case of suspension of execution of sentence (see cases cited in notes 19, 20, 21, *infra*, p. 25), as well as in the case of suspension of imposition of sentence. It would be indeed an absurd result, destroying the usefulness of the statute, if probation could be revoked only where the impo-

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sentence has been imposed, or, where sentence has been withheld, revoke the probation: * * *."

And in *Moore* v. *United States*, 101 F. (2d) 56, 58 (C. C. A. 2), certiorari denied, 306 U. S. 664, it was said:

"It is true that the term 'suspension of execution of sentence' was not included in the statute which provides that 'the court may revoke the probation or the suspension of sentence' but the statute covers both the situation where probation has been granted after sentence has been imposed and its execution suspended and that where it has been granted without the actual imposition of any sentence as where there has been a suspension of the sentence itself."

Still another possible explanation is that under the statute probation cannot be granted without a "suspension of sentence," either through the suspension of its imposition or its execution, and vice versa. Cf. *Miller* v. *Aderhold*, 288 U. S. 206; *Campbell* v. *Aderhold*, 36 F. (2d) 366 (N. D. Ga.). Congress therefore may have used the word "or" merely as a link between two synonyms. The term "suspension of sentence" has commonly been applied to either suspension of imposition or suspension of execution of sentence (*Richardson* v. *Commonwealth*, 131 Va. 802, 808 (1921)).

sition of sentence is suspended and not where the execution of a sentence is suspended.

If, then, the revocatory power extends equally to both situations, the court may, upon revocation of probation, in the plain terms of the statute, "impose any sentence which might originally have been imposed."[17] (*Attorney General's Survey of Release Procedures*, Vol. II, *Probation*, p. 334; Chappell, *Decisions Interpreting the Federal Probation Act* (1937), pp. 21–22.) This means obviously that in a case in which a sentence has been pronounced and its execution deferred, the court may supplant that sentence with a new sentence[18] which gives either the same punishment

[17] This does not mean, as petitioner seems to think the Government must contend (Br. 8–9), that where payment of a fine had been required and execution of a sentence of imprisonment has been suspended, the court upon revocation of probation may impose not only the maximum term of imprisonment but also, in disregard of the payment of the fine, impose the maximum fine allowed by the penal statute or the maximum fine, minus the fine paid. The revocatory power and the concomitant power to "impose any sentence which might originally have been imposed" extends only to that portion of the sentence which has been suspended, the imprisonment portion. There has been no suspension of the fine portion of the sentence. That has been executed or satisfied.

[18] While it was said in 36 Op. A. G. 186, 192, that, "If it had been the intention to create such an important power [authority to change the original sentence], it would seem that more explicit language would have been used," it is difficult to see how Congress could have made its intention much plainer.

as,[19] or more,[20] or less,[21] than that provided in the original sentence.[22]

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[19] *Weber* v. *Squier*, 124 F. (2d) 618 (C. A. A. 9), certiorari denied, 315 U. S. 810; *Kaplan* v. *Hecht*, 24 F. (2d) 664 (C. C. A. 2); *Cornerz* v. *United States*, 69 F. (2d) 965 (C. C. A. 5); *Campbell* v. *Aderhold*, 36 F. (2d) 366 (N. D. Ga.).

[20] *Moore* v. *United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664; *Remer* v. *Regan*, *supra*; cf. *Mason* v. *Zerbst*, 74 F. (2d) 920 (C. C. A. 10); *Nix* v. *James*, 7 F. (2d) 590, 592 (C. C. A. 9); cf. In re *Marcus*, 11 Cal. App. (2d) 359 (1936).

[21] *Van Riper* v. *United States*, 113 F. (2d) 929 (C. C. A. 2), certiorari denied, 311 U. S. 696; *Reeves* v. *United States*, 35 F. (2d) 323 (C. C. A. 8); *Scalia* v. *United States*, 62 F. (2d) 220, 221, 223 (C. C. A. 1); *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5); *Cline* v. *United States*, 116 F. (2d) 275 (C. C. A. 5); *Crowder* v. *Aderhold*, 46 F. (2d) 357 (N. D. Ga.) [This decision is somewhat unclear. It is difficult to tell whether the decision sustained the reduction within the framework of the Probation Act or not. The sentencing judge certainly purported to act under that statute and his new sentence was upheld, but the decision states (p. 358): "Since revocation of a previous sentence is not mentioned, perhaps the power to impose any sentence that might have been originally imposed ought to be confined to cases in which no sentence had been pronounced before probation, but this need not be determined, because the new sentence was less than the old one and affords the applicant no cause for complaint." This decision is the only case we have found which expresses even a doubt that the language of the Probation Act permits a new sentence on revocation. Cf. however, the later holdings of the same judge in *United States* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5); *United States* v. *Akerman*, 61 F. (2d) 570 (C. C. A. 5), and *Cornerz* v. *United States*, 69 F. (2d) 965 (C. C. A. 5).]

[22] We do not understand that either petitioner or the dissenting judge questions that this is the effect of the language of the statute. They contend that despite its language the

It follows therefore that what Congress in essence authorized was not merely a suspension of service of the original sentence, leaving that sentence intact upon revocation of probation, but a complete revision of that sentence. As a sentence it is a "dead letter," as was aptly said in *Cornerz* v. *United States*, 69 F. (2d) 965, 966 (C. C. A. 5).[23] Its authority as a sentence is supplantable by what might be determined upon as the punishment pursuant to the exercise of the power contained in the revocation clause.[24] It is only after that determination that there results a judgment which is final as the measurement of punishment.[25] As was said in *United States* v. *Akerman*, 61 F. (2d)

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statute should be construed as not permitting the "increase" in the term of imprisonment because of the double punishment clause. But the argument fails to realize the impact of the statute's language upon the finality of the imprisonment portion of the original sentence as the measure of punishment.

[23] See, also, *Greenhaus* v. *Sanford*, 37 F. Supp. 644, 646 (N. D. Ga.); *Scalia* v. *United States*, 62 F. (2d) 220, 223 (C. C. A. 1).

[24] See cases cited in notes 19, 20, 21, *infra*; see also *Pagano* v. *Bechly*, 211 Iowa 1294 (1930); *State* v. *Ensign*, 38 Ida. 539 (1924); *State* v. *Smith*, 175 Ind. 388 (1910); *State ex rel. Gentry* v. *Montgomery*, 317 Mo. 811 (1927).

[25] See *People ex rel. Pringle* v. *Livingston*, 135 Misc. 475, 477–478, 239 N. Y. S. 122 (1930); *People ex rel. Becker* v. *Page*, 125 Misc. 538, 540, 211 N. Y. S. 401 (1925); *People* v. *Fisher*, 237 Mich. 504 (1927); *In re Goetz*, 46 Cal. App. (2d) 848, 851 (1941); *State* v. *Ensign*, 38 Idaho 539, 544 (1924).

570, 571 (C. C. A. 5), "When probation was revoked and 'such sentence imposed as might originally have been imposed,' the provisions of the Probation Act were exhausted. The sentence then imposed was final in the same way that all criminal sentences were before that law was passed." If the final determination on revocation of probation results in a greater punishment than that originally pronounced, the "increase" is, of course, merely chimerical, since the first pronouncement was subject to modification upon noncompliance with the terms of probation and was thus only tentative or interlocutory as a declaration of punishment.[26]

That Congress did not intend to draw a sharp distinction between a suspension of imposition of sentence and a suspension of execution of sentence is further indicated by the practical result which

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[26] This is entirely consistent with the ruling of this Court in *Berman* v. *United States*, 302 U. S. 211. There the question was whether a sentence, the execution of which was suspended incident to the placing of the defendant on probation, was final *for the purpose of appeal*. This Court held that it was, under the test that a judgment "is final for the purpose of appeal 'when it terminates the litigation * * * on the merits' and leaves nothing to be done but to enforce by execution what has been determined.'" A similar holding was made recently by this Court in *Korematsu* v. *United States*, No. 912, last Term, decided June 1, 1943, in respect of a probation order where imposition of a sentence was suspended. Indeed, the latter decision highlights the limited nature of the *Berman* decision as a ruling on finality, since the order in the Korematsu case was regarded for the purpose of appeal as the equivalent of a sentence.

would flow from observance of the distinction, and by the legislative background of the Act:

If such a distinction were to be made, the original sentence would be untouchable on revocation of probation, since only the suspension of its execution could be vacated. Consequently the court could not impose either a greater, the same, or even a lesser punishment than that originally pronounced. But it would not be at all trammeled as to the sentence which it could pronounce if it had merely suspended the imposition of sentence. It could, upon revocation of probation, without question impose any sentence which it might originally have rendered. The device of suspending execution would, consequently, be little used in the probationary scheme. The courts would inevitably turn to the expedient of suspending the imposition of sentence under which their discretion is not so "cabined, cribbed, confined." It is difficult to believe that under a law which should permit the greatest flexibility in administration to accomplish most effectively its aims, Congress intended any such divergent result to flow from a selection of one as contrasted with the other of the two forms of suspension of sentence.

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[27] *Burns* v. *United States*, 287 U. S. 216, 220; *Scalia* v. *United States*, 62 F. (2d) 220, 223 (C. C. A. 1); *United States* v. *Antinori*, 59 F. (2d) 171, 172 (C. C. A. 5); *Reeves* v. *United States*, 35 F. (2d) 323, 325 (C. C. A. 8); *Nix* v. *James*, 7 F. (2d) 590, 592 (C. C. A. 9); *Archer* v. *Snook*, 10 F. (2d) 567, 568 (N. D. Ga.).

Indeed, that Congress intended to make no distinction between suspension of imposition and suspension of execution in the exercise of the revocation power is indicated by the House Report on the bill which became the Probation Act. In one place in that Report, No. 1377, 68th Cong., 2d Sess., it is stated that "In case of failure to observe these conditions [the conditions of probation], those on probation may be returned to the court *for sentence*" [Italics supplied], and in specifying the "principal provisions" of the bill the Report states in another place (p. 5):

> SEC. 2. *Providing for terminating and revoking probation.*—It is important that probation be enforced, in order that it may be a real system of discipline and in order that society may be well protected. Hence it is provided that the probation officer may arrest without a warrant *and that the court may impose the penalty at any time during the probation period.* [Italics supplied.]

The present Act stands in distinct contrast, in this respect, to the measure passed by Congress in 1917 but pocket-vetoed by the President. In that measure only the power to suspend execution of sentence was conferred, and upon revocation the defendant could only be required "to serve the sentence or pay the fine originally imposed." See H. R. 20414, 64th Cong., 2d sess.; 54 Cong. Rec. 3637, 4373; see also Hearings be-

fore the Committee on the Judiciary, House of Representatives, 66th Cong., 2d sess., on H. R. 340, 1111, and 12036, March 9, 1920, pp. 5, 106–107, 112–113.

That Congress knowingly phrased the revocation clause so as to permit a new and even greater sentence is evidenced by another fact. As stated, the Act was "modeled on the best provisions for adult probation in force in the States of New York, Massachusetts, and other States having successful probation work" (*supra*, p. 18). In 1925 when the Federal act was passed, seven states had probation statutes authorizing suspension of both imposition and execution of sentence and revocation thereof.[28] The revocation clauses of all these, except the New York statute, provided that if imposition of sentence had been suspended, the court might impose sentence and if execution of sentence had been suspended, the original sentence was to be in full force and effect.[29] Congress did not choose, however, to incorporate this distinction into its own act. It turned for a model

[28] The statutes of two other states, Mississippi and Utah, authorized suspension of imposition or execution of sentence, but contained no revocation clause. See Miss. Laws, 1926, ch. 147; Utah Laws, 1923, ch. 74.

[29] See Cal. Stat. Penal Code, 1925, sec. 1203 (g); Idaho Code Ann. (1932), sec. 19–2505; Rev. Stats. of Maine (1916), c. 137, sec. 14; Mass. Gen. Laws (1921), c. 279, sec. 3; Va. Code Ann. (1936; 1940 Supp.), sec. 1922b; Wis. Stats. (1925), sec. 57.03. This type of revocation clause is the one most often found in the numerous state probation statutes which now permit suspension of imposition or execution of sentence, with probation. But see notes 30 and 31, *infra*, pp. 31–32.

instead to the broader revocatory power reflected in the New York statute. That statute at the time provided that after re-arresting the defendant the court might—

> if sentence shall have been suspended, impose any sentence or make any commitment which might have been imposed or made at the time of conviction *or may, if sentence shall have been imposed and execution of the whole or a part of the judgment suspended, revoke the order suspending execution of judgment and order executed the judgment or the part thereof the execution of which shall have been suspended or may modify the judgment so as to provide for the imposition of any punishment which might have been imposed at the time of conviction.* [Cahill's Cons. Laws of N. Y., 1923, c. 41, sec. 2188.]

The revocation clause of the Federal Act is but a concise statement of this authorization,[*] which,

[*] The same conciseness is now reflected in the New York statute, which was amended in 1928 to read as follows: "The court may, * * * revoke the order suspending sentence or its execution and may impose such sentence or make such commitment as might have been made at the time of conviction." [N. Y. Laws, 1928, ch. 841.] Other state statutes contain revocation clauses which are probably similarly construable. They provide that upon revocation "the court * * * may make such orders as justice requires" (N. H. Rev. Laws (1942), ch. 379, sec. 14) and "the court * * * shall proceed to deal with the case as if there had been no probation or suspension of sentence" (N. C. Code Ann. (1939), sec. 4665 (4); S. C. Code (1942), sec. 1038–4).

under the New York statute, was held to make the prison term originally specified "but tentative" and "a vain thing" in case the court should thereafter desire to change it (*People ex rel. Decker* v. *Page*, 125 Misc. 538, 540, 211 N. Y. S. 401 (1925); see, also, *People ex rel. Pringle* v. *Livingston*, 135 Misc. 475, 476–477, 239 N. Y. S. 122 (1930); *People ex rel. Lehman* v. *Hunt*, 8 N. Y. S. (2d) 793, 255 App. Div. 931 (1938)). It should be noted also that under the New York statute in effect at the time this applied even though a fine was imposed and paid and the imprisonment portion of the sentence only was suspended (*People ex rel. Decker* v. *Page*, *supra*), which, of course, is our interpretation of the Federal statute.[31]

In sum, it follows that the Act permitted the very same result to be attained in this case upon revocation of probation as it would have if the petitioner had been required to pay the same fine

[31] Three state probation statutes passed subsequent to the enactment of the Federal Probation Act are practically identical with it insofar as they authorize probation upon suspension of imposition or execution of sentence, imposition of a fine and probation, payment of a fine in one or several sums during probation, and, upon revocation of "probation or the suspension of sentence," the imposition of "any sentence which might originally have been imposed." See 4 Colo. Stats. Ann. (1935), ch. 140 (passed in 1931); 4 Ind. Stats. Ann. (Burns 1933), secs. 9–2209, 9–2210, 9–2211 (passed in 1927); N. J. Stats. Ann. (1939), secs. 2:199–1, 2:199–2, 2:199–4 (passed in 1929).

as a condition of probation, and the imposition, rather than the execution, of a prison term had been suspended. In either case the court is authorized to give a prison term of three years under the authority to impose "any sentence which might originally have been imposed." The original declaration of prison sentence, unexecuted, is thus merely provisional.

II

THE PROBATION ACT, GIVEN THE CONSTRUCTION WHICH ITS LANGUAGE REQUIRES, DOES NOT VIOLATE THE DOUBLE PUNISHMENT CLAUSE

If, as we submit, our analysis of the Probation Act, is sound, there is no basis for the view of petitioner and the dissenting judge that double punishment resulted when, upon revocation of probation, the district court "increased" petitioner's term of imprisonment from two to three years.

Where, as here, a fine is imposed but execution of the prison sentence is suspended, the fine, when paid, cannot be increased if probation is violated, since that portion of the sentence has been fully executed. The Act, however, makes the unexecuted portion of the sentence, the imprisonment portion, merely tentative or interlocutory, and permits, upon revocation of probation, the imposition of a new sentence which may specify a longer term of imprisonment than that originally indicated. It is only when this new sentence is pro-

nounced that there is a final declaration of the punishment to be suffered, a judgment finally measuring the punishment. There is hence no *real* increase in punishment where, as in the instant case, the new sentence imposes a longer term of imprisonment. Giving the double punishment clause of the Fifth Amendment the broadest interpretation, certainly there cannot be double punishment until there has been a final determination of the punishment to be suffered and a court has then attempted to increase the punishment.[32]

Our position assimilates, for constitutional purposes, the suspension of imposition and the suspension of execution of sentence under the Probation Act. This Court in the *Korematsu* case, No. 912, 1942 Term, observed "The difference to the probationer between imposition of sentence followed by probation, as in the *Berman* case, and suspension of imposition of sentence, as in the instant case, is one of trifling degree." To make

[32] It has been held that, at least in certain contingencies, the Fifth Amendment does not even prevent increases in sentences which purport to speak with finality or are "judgmental in character," to use the language of Associate Justice (now Mr. Justice) Rutledge in *Rowley* v. *Welch*, 114 F. (2d) 499, 503 (App. D. C.); see also *De Maggio* v. *Coxe*, 70 F. (2d) 840 (C. C. A. 2); *Hatem* v. *United States*, 42 F. (2d) 40 (C. C. A. 4), certiorari denied, 282 U. S. 887; *Jordan* v. *United States*, 60 F. (2d) 4.6 (C. C. A. 4), certiorari denied, 287 U. S. 633; *Cisson* v. *United States*, 37 F. (2d) 330, 332 (C. C. A. 4); *Commonwealth* v. *Weymouth*, 2 Allen, 144 (Mass.), 79 Am. Dec. 776.

that trifling difference the touchstone of constitutional rights would be to "trivialize" (*O'Malley* v. *Woodrough*, 307 U. S. 277, 282) the great constitutional guarantee against suffering repeated prosecution or repeated punishment for the same offense.

Indeed, if an increase in the tentative declared punishment were invalid, grave doubt would be cast on the power to extend the period of probation, a power explicitly conferred by Section 2 (subject to a maximum of five years) and one which lies at the heart of the probationary process. Probation is a form of "ambulatory punishment," as this Court said in the *Korematsu* case, *supra*, and its extension after service thereof has begun would seem to be at least as substantial a change in sanctions as an increase in the declared term of imprisonment which has not commenced. In our view an extension of either is valid because in either event there has been no final declaration of punishment.

Neither petitioner nor the dissenting judge cites any decision involving the Probation Act which sustains his position. The decision upon which they principally rely is *Ex parte Lange*, 18 Wall. 163, particularly as interpreted in *United States* v. *Benz*, 282 U. S. 304, 307. The *Lange* case and the similar later case of *In re Bradley*, 318 U. S. 50, involved attempts to correct, through the medium of new and more severe sen-

tences, partially invalid sentences which were meant to be, and on their face were, final declarations of punishment, which the judges who imposed them intended should be executed, and which were in fact in valid part executed."[*]

Since it was permissible and valid, under the Act, to have a partial execution of the original sentence in the case at bar through payment of the fine, the case is indistinguishable from *Moore* v. *United States*, 101 F. (2d) 56 (C. C. A. 2), certiorari denied, 306 U. S. 664, and *Reiner* v. *Regan*, 104 F. (2d) 704, 705–706 (C. C. A. 9), certiorari denied, 308 U. S. 553. In the *Moore* case, Moore had been sentenced to two years' imprisonment but execution of the sentence had been suspended and Moore granted probation. Mr. Justice Van Devanter (then retired and sitting as a United States District Judge) later revoked probation because of its violation and sentenced Moore to seven years' imprisonment and a fine of $300. The sentence was sustained on appeal. While the opinion of the circuit court of appeals does not in specific terms discuss Mr. Justice Van Devanter's power to increase the term of imprisonment, it does disclose that one of the questions presented to that court was "the jurisdiction of the District Court." But even if the validity of the increased sentence was

[*] Other authorities relied upon by petitioner involved the partial execution of sentences which were completely final in character.

not actually passed upon by the court, the question was a fundamental one, appearing upon the face of the record, and was argued in both the petition for a writ of certiorari (pp. 7–8, 13–17) and the Government's brief in reply (pp. 10–12). Nevertheless, this Court denied certiorari.

In *Remer* v. *Regan*, *supra*, in which this Court also denied certiorari, Remer's original two-year sentence on a count under which he was placed on probation was increased to three years upon revocation of probation. The circuit court of appeals specifically held that the three-year sentence was not void as in violation of the Fifth Amendment, stating that the suspension of the original sentence was valid, and that "an increase of sentence is expressly authorized" by the Probation Act and "is potentially a part of the original sentence" (p. 705). Cf. *People* v. *Roberts*, 136 Cal. App. 709 (1934).[24]

[24] Such contrary expressions of opinion as there are almost invariably are based not on the language of the statute but on the fear that "increasing" the original sentence would conflict with the Constitution. See Attorney General's *Survey of Release Procedures*, Vol. I, *Digest of Federal and State Laws on Release Procedures*, p. 13; *ibid.* Vol. II, *Probation*, p. 334; Chappell, *Decisions Interpreting the Federal Probation Act* (1937), pp. 21–22. But if, as we submit, the original sentence is not final as a declaration of punishment, there is no basis for this fear. Where they attempt it, those who entertain the doubt have difficulty in explaining how the original sentence is so far final as the measurement of punishment that it may not be increased upon revocation of probation but may be modified by reducing it. The power to

These decisions reflect the spirit of the decisions of this Court which have declined to find in the former-jeopardy clause of the Constitution a barrier to sensible and equitable procedures in the administration of the criminal law. Thus, for example, a new trial may be had where a prior jury has disagreed (*Dreyer* v. *Illinois*, 187 U. S. 71), or where a prior jury was discharged for misconduct (*Simmons* v. *United States*, 142 U. S. 148); a defendant may be held for extradition after his discharge under a prior warrant of arrest therefor (*Collins* v. *Loisel*, 262 U. S. 426); and a greater sentence may be imposed following a defendant's appeal from a conviction (*Trono* v. *United States* 199 U. S. 521).

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reduce the original sentence, because it is not a final determination of punishment, stems from the Act, just as much as the power to increase, and it is on that basis that reduction has been permitted. *United States* v. *Antinori*, 59 F. (2d) 171, 172 (C. C. A. 5). It is of no importance therefore that, upon the theory that the term has been extended by the Probation Act, a court might, in the absence of express language in the Act, have inherent power to reduce its sentence, upon revocation of probation, under the rule of *United States* v. *Benz*, 282 U. S. 304. Also, it is no answer to say that since the original sentence is sufficiently final for the purpose of appeal, it should be deemed sufficiently final for the purpose of the double punishment clause of the Fifth Amendment. As we have pointed out, such a sentence is final for the purpose of appeal simply because it terminates the litigation on the merits (note 26, *supra*, p. 27). It still may not be final as the measurement of punishment, and if it is not, as we submit, double punishment cannot result because later there is merely an "increase" as a matter of mathematics.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the circuit court of appeals should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 19.—October Term, 1943.

Frank Roberts, Petitioner,
vs.
The United States of America.
On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 22, 1943.]

Mr. Justice Black delivered the opinion of the Court.

In April, 1938, petitioner pleaded guilty to a violation of 18 U. S. C. 409 and the District Court entered a judgment sentencing him to pay a fine of $250 and to serve two years in a federal penitentiary. Acting under authority of the Probation Act[1] the court then suspended execution of the sentence conditioned upon payment of the fine, and ordered petitioner's release on probation for a five year period. The fine was paid and he was released. In June, 1942, the court after a hearing revoked the probation, set aside the original sentence of two years, and imposed a new sentence of three years. The Circuit Court of Appeals affirmed, 131 F. 2d 392. Certiorari was granted because of the importance of questions raised concerning administration of the Probation Act.

The power of the District Court to increase the sentence from two to three years is challenged on two grounds: (1) Properly interpreted the Probation Act does not authorize a sentence imposed before probation, the execution of which has been suspended, to be set aside and increased upon revocation of probation; (2) If construed to grant such power, the Act to that extent violates the prohibition against double jeopardy contained in the Fifth Amendment. We do not reach this second question.

If the authority exists in federal courts to suspend or to increase a sentence fixed by a valid judgment, it must be derived from the Probation Act. The government concedes that federal courts had no such power prior to passage of that Act.

[1] 43 Stat. 1259; 46 Stat. 503; 48 Stat. 256; 53 Stat. 1223, 1225; U. S. C. Title 18, §§ 724-728.

See *Ex parte United States*, 242 U. S. 27; *United States* v. *Mayer*, 235 U. S. 55; *Ex parte Lange*, 85 U. S. 163; *United States* v. *Benz*, 282 U. S. 304. In the instant case that part of the original judgment which suspended execution of the two-year sentence and released the petitioner on probation was authorized by the literal language of Section 1 of the Probation Act (U. S. C. Title 18, § 724) granting the District Court power "to suspend the . . . execution of sentence and to place the defendant upon probation. . . ." But before we can conclude that the Act authorized the District Court thereafter to increase the sentence imposed by the original judgment we must find in it a legislative grant of authority to do four things: revoke probation; revoke suspension of execution of the original sentence; set aside the original sentence; and enter a new judgment for a longer imprisonment.

We are asked by the government to find this legislative grant in Section 2 of the Act as amended (U. S. C. Title 18, § 725) a part of which is set out below.[2] It is clear that power to do the first two things, revoke the probation and the suspension of sentence, is expressly granted by Section 2. It is equally clear that power to do the third, set aside the original sentence, is not expressly granted. If we find this power we must resort to inference.

Except by strained construction we could not infer from the express grant of power to revoke probation or suspension of sentence the further power to set aside the original sentence. Neither probation nor suspension of execution rescinded the judgment sentencing petitioner to imprisonment;[3] the one merely ordered that petitioner be released under the supervision of probation officials, the other that enforcement of his sentence be postponed. Upon their revocation, without further court action, the original sentence remained for execution as though it had never been suspended. Cf. *Miller* v. *Aderhold*, 288 U. S. 206, 211.

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[2] "At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." 43 Stat. 1260; 48 Stat. 256.

[3] Cf. Pile v. United States, 130 U. S. 280; United States v. Weiss, 28 F. Supp. 598, 599; Pernatto v. United States, 107 F. 2d 372; Kriebel v. United States, 10 F. 2d 762; Ackerson v. United States, 15 F. 2d 268, 269; Moss v. United States, 72 F. 2d 30, 32; King v. Commonwealth, 246 Mass. 57, 60; Belden v. Hugo, 88 Conn. 500, 504; In re Hall, 100 Vermont 197, 202.

2 "At any time within the probation period the probation officer may arrest the probationer . . . or the court which has granted the probation may issue a warrant for his arrest . . . (and) such probationer shall

If then the power to set aside and increase the prison term of the original sentence is to be inferred at all from Section 2, it must be drawn from the clause which empowers the court after revocation of the probation and the suspension of sentence to "impose any sentence which might originally have been imposed." It is undisputed in the instant case that the court could originally have imposed a three-year sentence. Therefore the existence of power to set aside the first judgment in order to increase the sentence would be a perfectly logical inference from the clause if it stood alone, because two valid sentences for the same conviction cannot coexist. But the clause cannot be read in isolation; it must be read in the context of the entire Act. And in the absence of compelling language we should not read into it an inferred grant of power which necessarily would bring it into irreconcilable conflict with other provisions of the Act.

To accept the government's interpretation of this clause would produce such a conflict. Section 1 of the Probation Act provides the procedural plan for release on probation. After judgment of guilt, the trial court is authorized "to suspend the *imposition* or *execution* of sentence and to place the defendant upon probation: . . ." (Italics supplied.) By this language Congress conferred upon the court a choice between imposing sentence before probation is awarded or after probation is revoked. In the first instance the defendant would be sentenced in open court to imprisonment for a definite period; in the second, he would be informed in open court that the imposition of sentence was being postponed. In both instances he then would be informed of his release on probation upon conditions fixed by the court. The difference in the alternative methods is plain. Under the first, where execution of sentence is suspended, the defendant leaves the court with knowledge that a fixed sentence for a definite term of imprisonment hangs over him; under the second, he is made aware that no definite sentence has been imposed and that if his probation is revoked the court will at that time fix the term of his imprisonment. It is at once apparent that if we accept the government's interpretation this express distinction which Section 1 draws between the alternative methods of imposing sentence would be completely obliterated. In the words of the government, any sentence pronounced upon the defendant before his release on probation would be a "dead letter." Thus the

express power to suspend execution of sentence granted by Section 1 would, by an inference drawn from Section 2, be reduced to a meaningless formality. No persuasive reasons relating to congressional or administrative policy have been suggested to us which justify construing Section 2 in this manner.

The ten-year legislative history of the Probation Act strongly suggests that Congress intended to draw a sharp distinction between the power to suspend execution of a sentence and the alternative power to defer its imposition. The first probation legislation was passed by Congress in 1917 but failed to receive the President's signature. As originally introduced this bill provided only for the suspension of imposition of sentence.[4] After extended hearings the Senate Judiciary Committee reported it with amendments including two which were intended to grant courts power to choose between suspending imposition and suspending execution.[5] But when the bill finally passed both Houses the power to suspend imposition had been eliminated and only the power to suspend execution remained.[6] Between 1917 and 1925, when the present Act was passed and approved by the President, the several congressional committees interested in probation legislation considered numerous bills. Some provided only for suspension of imposition, some only for suspension of execution, and some for either method as the court saw fit.[7] During this period there were advocates of those bills which provided for the suspension of imposition of sentence, but others opposed such bills. Attorney General Palmer, belonging to the latter group, expressed his opposition to a bill which provided for the suspension of imposition, pointing out that, "The judge may also, in his discretion, terminate the probation at any time within the period specified and require the defendant to serve not a sentence *which had been originally pronounced upon him*, but a sentence to be pronounced at the time of the termination of the probation

[4] Hearings before subcommittee of the Committee on the Judiciary, U. S. Senate, on S. 1092, 64th Cong., 1st Sess., March 25, 1916, pp. 5, 6.

[5] Report No. 887, Senate Committee on the Judiciary, 64th Cong., 2nd Sess.

[6] 54 Cong. Rec. 3637, 4373; Hearings before the House Committee on the Judiciary, 66th Cong., 2nd Sess., on H. R. 340, 1111 and 12036, March 9, 1920, pp. 106-107, 112-113.

[7] Summaries of state legislation were inserted into the records of the committee hearings and many witnesses discussed such legislation. See, e. g., *Ibid.*, 123-130, 38-44. Like the bills before Congress, the state probation acts were not uniform in their treatment of suspension of sentence.

for the act contemplates that in granting probation a court suspends *even the imposition of a sentence*. . . . The conferring of such powers upon judges would not, it seems to me, contribute to the proper and uniform administration of criminal justice."[8] (Italics supplied.) In the end Congress declined to adopt one method of suspension to the exclusion of the other and instead granted the courts power to apply either method according to the circumstances of each individual case. From this compromise of the conflicting views on the proper method of suspension we may conclude that Congress indicated approval of the natural consequences of the application of each method. As understood by Attorney General Palmer one of these consequences was that when the method of suspension of execution was used the defendant could be required to serve only the sentence which had been originally pronounced upon him.

A construction of the Act to preserve the distinctive characteristics of the two methods of suspension is not inconsistent with the manner in which it has been enforced and administered. From the passage of the Act until 1940[9] the Attorney General exercised supervision over administration of the Act.[10] In 1930 the Attorney General in a carefully considered opinion reached the conclusion that if Congress had intended by Section 2 of the Probation Act "to create such an important power . . . [as that for which the government here contends] it would seem that more explicit language would have been used." 36 O. A. G. 186, 192. A comprehensive two-volume report by the Attorney General entitled "Survey of Release Procedures" published in 1939

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[8] *Ibid.*, 105.

[9] In 1940 administration of the probation system was transferred to the Administrative Office of the United States Courts under the provisions of an Act passed August 7, 1939. 53 Stat. 1223, 1225.

[10] The original Act required probation officers to "make such reports to the Attorney General as he may at any time require." 43 Stat. 1261. In June, 1925, three months after enactment of the law, the Attorney General sent to all United States District Judges a memorandum of suggestions in which he comprehensively discussed the duties of judges and probation officers and requested that monthly reports be made to him concerning the probation activities in each court. See 1925 Annual Reports and Proceedings of the National Probation Association, 227-230. In 1930 an amendment to the Probation Act stated that the Attorney General should "endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States courts." 46 Stat. 503, 504. See also 53 Stat. 1225.

adopted this interpretation of Section 2: "Where imposition of sentence was originally suspended and probation granted, and the probation and suspension are later revoked, it is plain that before the offender can be imprisoned imposition of sentence is necessary. And since the case reverts to its status at the time probation was granted, the court clearly is free to impose 'any sentence which might originally have been imposed.' 18 U. S. C. §725 (1934). But where the court imposed sentence but suspended the execution of it, it would seem that when the suspension of execution is revoked the original sentence becomes operative." Significantly, the report further pointed out that "No case has been found wherein the court, upon revocation of suspension of execution, increased the original sentence."[11]

So far as pointed out to us the present and two other cases are the only ones in which federal courts have, upon revocation of probation, increased a definite sentence which had been imposed upon an offender prior to his release on probation. Cf. *United States* v. *Moore*, 101 F. 2d 56; *Remer* v. *Regan*, 104 F. 2d 704. The *Moore* case was decided January 16, 1939, without discussion of the power of the court to increase the sentence. The *Regan* case was decided May 26, 1939, and the court pointed out that defendant apparently conceded that imposition of an increased sentence was authorized by the Probation Act. We have, therefore, an administration of the probation law from its passage in 1925 until 1939, in which the Attorney General not only assumed but expressly stated by official opinion that a definite sentence, execution of which had been suspended, could not be increased after the suspension had been revoked for breach of probation conditions; and in which the federal courts had apparently not undertaken to act contrary to the Attorney General's interpretation.

To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by a prior valid sentence gives

[11] Attorney General's Survey of Release Procedures, Vol. I, p. 13. Asserting that there is a distinction between a decrease and an increase of sentence, the report further stated: "However, it has been held that when suspension of execution is revoked the court may modify the original sentence so as to decrease the term of imprisonment." *Ibid.* Two Circuit Courts of Appeals had construed the Act as authorizing in that circumstance a judgment which reduced the term of the original sentence. United States v. Antinori (C. C. A. 5), 59 F. 2d 171; Scalia v. United States (C. C. A. 1), 62 F. 2d 220.

full meaning and effect both to the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abuse this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts. See *Burns* v. *United States*, 287 U. S. 216. Thus Congress conferred upon the courts the power to decide in each case whether to impose a definite term of imprisonment in advance of probation or to defer the imposition of sentence, the alternative to be adopted to depend upon the character and circumstances of the individual offender. All we now hold is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 19.—October Term, 1943.

Frank Roberts, Petitioner, *vs.* The United States of America. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 22, 1943.]

Dissenting opinion of Mr. Justice Frankfurter, in which the Chief Justice and Mr. Justice Reed concur.

The penological device of probation grew out of the realization that the practical application even of the humane notion of making the punishment fit the criminal presupposes wisdom seldom available immediately after conviction. Imposition of sentence at that time is much too often an obligation to exercise caprice, and to make convicted persons serve such a sentence is apt to make law a collaborator in new anti-social consequences. Probation is an experimental device serving both the offender and society. It adds the means for exercising wisely that discretion which, within appropriate limits, is given to courts. The probation system was devised to allow persons guilty of anti-social conduct to continue at large but under appropriate safeguards. The hope of the system is that the probationer will derive encouragement and collaboration in his endeavors to remain in society and never serve a day in prison. The fulfillment of that hope largely rests on the efficacy of the probation system, and that depends on a sufficient number of trained and skilful probation officers. Thus the probation system is in effect a reliance on the future to reveal treatment appropriate to the probationer. In the nature of things, knowledge which may thus be gained is not generally available when the moment for conventional sentencing arrives. Since assessment of an appropriate punishment immediately upon conviction becomes very largely a judgment based on speculation, the function of probation is to supplant such speculative judgment by judgment based on experience. For this reason probation laws fix a tolerably long period of probation, as, for instance, the five year period of the Federal Probation Act.

In view of all that led to the adoption of probation and the light its workings have cast, the imposition of a suspended term sentence is meaningless if indeed it does not contradict the central idea underlying probation. A convicted person who is given a term sentence and then placed on probation hopes never to spend a day in prison. The court returning the probationer to the community likewise assumes that the influence of probation will save the probationer from future imprisonment. To treat the pronouncement of a term sentence as a kind of bargain whereby the probationer knows that, no matter what, he cannot be put in prison beyond the term so named is to give a wholly unreal interpretation to the procedure. We certainly should not countenance the notion that a probationer has a vested interest in the original sentence nor encourage him to weigh the length of such a sentence against any advantages he may find in violating his probation. To bind the court to such a sentence is undesirable in its consequences and violative of the philosophy of probation. As we pointed out very recently, the difference to a probationer between imposition of sentence followed by probation and suspension of the imposition of sentence "is one of trifling degree." *Korematsu* v. *United States*, 319 U. S. 432, 435. The fact is that term sentences of which the execution is suspended are likely to be as full of vagaries and as unrelated to insight revelant to treatment for particular individuals, as are term sentences the execution of which is not suspended. The capricious nature of such defined sentences dominates all statistical and other evidence regarding conventional judicial sentencing, *e. g.*, *Criminal Justice in Cleveland* (1922) 303 *et seq.* and particularly Tables 20 and 21, and *Ambard* v. *Attorney General for Trinidad and Tobago* [1936] A. C. 322, and has led to suggestions for more scientific methods of sentencing, *see* Smith, Alfred E., *Progressive Democracy* (1928) 209 *et seq.*; Warner and Cabot, *Judges and Law Reform* (1936) 156 *et seq.*; Cantor, *Crime and Society* (1939) 254 *et seq.*; Glueck, *Criminal Careers in Retrospect* (1943) c. XVII.

If the experience of the District Court for the Southern District of New York—the district having the heaviest volume of federal criminal prosecutions—is a fair guide, the imposition of sentence, is more frequently suspended than is its execution. The only practical result of the strained reading of the powers of

the district courts by the decision today may well lead trial judges generally to place probationers on probation without any tentative sentence. A construction which leads to such a merely formal result, one so easily defeated in practice, should be avoided unless the purpose, the text and the legislative history of the Act converge toward it. The policy of probation clearly counsels against it, and neither the words of the Act nor their legislative history contradict that policy. So far as it is significant on this phase, the legislative history looks against rather than for such an undesirable construction. In contrast to the present Act, the first measure passed by Congress conferred only the power to suspend execution of sentence and upon its revocation required the defendant "to serve the sentence . . . . originally imposed". H. R. 20414, 64th Cong., 2d Sess. (1917). This enactment suffered a pocket veto. In reporting the present legislation to the House of Representatives, its Committee on the Judiciary explained that "In case of failure to observe these conditions [of probation], those on probation may be returned to the court for sentence." H. Report No. 1377, 68th Cong., 2d Sess., 2.

And the text of the legislation does not defeat this policy. Indubitably petitioner was arrested and brought before the court during his period of probation. In that event the statute is explicit in its direction that "the court may revoke the probation . . . and may impose any sentence which might originally have been imposed". The court having followed the mandate of the statute, it seems irrelevant and unimportant whether petitioner became a probationer either by a postponement of sentence or by a suspension of a sentence already imposed. We cannot say that the statute does not contemplate that the new sentence which it authorizes shall be effective. The obvious purpose is that it should become so either by superseding any sentence earlier imposed or by revoking the suspension of imposition of sentence if none was imposed. Such is the plain meaning and effect of the direction that upon the arrest of the probationer "the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed." In other words, suspension whether of the sentence or of its execution leaves a trial court free to commit the criminal to prison if he fails to meet the test of freedom during the probationary period.

It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders. To vest in courts the power of adjusting the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation, of course does not offend the safeguard of the Fifth Amendment against double punishment. By forbidding that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb", that Amendment guarded against the repetition of history by trying a man twice in a new and independent case when he already had been tried once, see Holmes, J., in *Kepner* v. *United States*, 195 U. S. 100, 134, or punishing him for an offense when he had already suffered the punishment for it. But to set a man at large after conviction on condition of his good behavior and on default of such condition to incarcerate him, is neither to try him twice nor to punish him twice. If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder.